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IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 646

BIRMINGHAM CORPORATION, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

RUSSELL D. MORRILL,
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January 27, 1944.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause on November 1, 1943.

Opinions Below

The opinion of the Tax Court of the United States (R. 14-22) is reported in 1 T. C. 808. The opinion of the Circuit Court of Appeals (R. 34-39) is reported in 138 F. (2d) 455.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered November 1, 1943 (R. 40). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether the conditions of Section 351(d) of the Revenue Act of 1934 were complied with in this case so that personal holding company surtax for the year 1935 should not apply to the taxpayer.

Statutes Involved

Revenue Act of 1934

> Sec. 351. SURTAX ON PERSONAL HOLDING COMPANIES.
>
> * * * * *
>
> (d) *Payment of surtax on pro rata shares.*—The tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire pro rata shares, whether distributed or not, of the "adjusted net income" of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. * * *

Regulation 86

> Art. 351-7.
>
> *Payment of surtax on pro rata shares.*—The surtax imposed by section 351 does not apply to any taxable year if every shareholder includes, at the time of filing his return, in his gross income his entire pro rata share of the adjusted net income of the corporation for the taxable year of such corporation ending with or during his taxable year. * * *

Statement

The facts as found by the Tax Court (R. 16-18) may be summarized as follows:

In 1935 the taxpayer, Birmingham Corporation, was a personal holding company, all of the stock of which was owned by Otto Marx, Sr., his wife, two sons, and a trust for

a daughter. Being a family personal holding company dominated by Otto Marx, Sr., the husband and father, the conduct of its affairs was informal. In December 1935 Otto Marx, Sr. determined it would be advantageous not to distribute the earnings of the corporation for that year and proposed to the other members of the family that each stockholder include in his individual return his pro rata share of the corporation's net income for that year. All of the stockholders agreed to this proposal. The income tax return and the personal holding company return of the petitioner corporation and the individual income tax returns of all of the stockholders were filed timely and included pro rata shares of the corporation's net income, in accordance with this agreement, with one exception, the return of Henry Marx which was filed under the following circumstances:

Henry Marx first filed his return for 1935 on February 20, 1936 and failed to include his pro rata share of the corporation's net income. On March 7, 1936 he filed an amended return which also failed to include his pro rata share of the corporation's net income. On or about March 8th or 9th, 1936 Henry Marx was informed by the corporation's secretary of the amount of his pro rata share. At this time Henry Marx was busy in professional work as a lawyer and neglected to take immediate steps to correct his mistake of failing to include his share of the corporation's net income in his original or first amended return. However, on March 28, 1936 Henry filed a second amended return and included therein his pro rata share of the corporation's net income. Late in April or early in May, 1936 Henry Marx received a request from the Collector of Internal Revenue for additional surtax with respect to his second amended return which he paid.

The Commissioner held that the requirements of 351(d) of the Revenue Act of 1934 had not been met because of the late filing of Henry's return including his share of the corporation's net income and determined a deficiency of personal holding company surtax against the corporation

of $11,904.76 (R. 15). The Tax Court approved the Commission's action and held that Section 351(d) provided strict requirements which it was without power to relax and which did not permit of an amended return after the due date even to correct an omission due to mere innocent oversight. The Tax Court relied upon the decision of this Honorable Court in *Riley Investment Co.* v. *Commissioner*, 311 U. S. 55 (R. 22).

The majority of the Circuit Court agreed with the Commissioner and the Tax Court that the second amended return of Henry Marx did not measure to compliance with the requirements of the law and held that Section 351(d) must be complied with strictly to the letter, citing the *Riley* decision *supra* (R. 34-36).

Judge Waller, however, wrote a vigorous dissenting opinion (R. 37-39) on the ground that to permit the filing of the amended return by Henry Marx only 13 days late to correct an error and oversight would be in accordance with an immemorial policy of the Treasury Department (except where the statute expressly provides otherwise) to permit a taxpayer seasonably to correct errors and oversights in his return; that an extension of time for filing to beyond the date filed could have been granted by the Collector of Internal Revenue and that the acceptance by the Collector of Internal Revenue of the amended return and the tax was equivalent to the granting *nunc pro tunc* of an extension of time for correcting the original return. Judge Waller distinguished the *Riley Investment Co.* decision on the ground that an extension of time could not under the statute have been granted for the length of time which the taxpayer took in that case to correct its error.

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that Section 351(d) of the Revenue Act of 1934 required compliance strictly to the letter thereof.

2. In applying and interpreting the *Riley Investment Co.* decision *supra* to require such strict construction of the statute here in question.

3. In failing to distinguish the decisions of this Court and the various Circuit Courts under other statutes by the express terms of which or in order to prevent abuses a strict interpretation was required.

4. In failing to hold that an amended return was permissible in this case within the dictum of the *Riley* decision to correct error in the original return of one minority stockholder and carry out the purpose of Congress.

Reasons for Granting Writ

The writ of certiorari should be granted in this case to prevent the doing of an injustice and to dispel the doubt as to the acceptability, in the absence of clearly prohibitive reasons, of an amended tax return to correct an error even though filed after the due date. As Judge Waller so aptly stated in his dissenting opinion in this case (R. 37) "The right of a taxpayer to have his return speak the truth and accurately reflect his income is not only grounded in long standing policy and precedent but in common honesty and good morals." There is no prohibition in the statute and no reason based on the facts or governmental policy for refusing to allow in this case the correction of an error, not made by the taxpayer but by a minority stockholder, which penalizes the corporation taxpayer and all of the other stockholders and thwarts the purpose of the law.

The decision of the Circuit Court in this case and other decisions[1] promote confusion and conflict with respect to

[1] *Morrow, Becker & Ewing* v. *Commissioner*, 57 F. (2d) 1; *C. H. Mead Coal Co.* v. *Commissioner* (C. C. A. 4) 106 F. (2d) 388.

the conditions under which an amended return may be filed and accepted to correct an error. Other Tax Court decisions[2] uphold a liberal interpretation of Section 351(d) or a similar statutory provision on behalf of the Government.

This Court has clearly laid down the rule under the capital stock tax statutes[3] which require a declaration in a "first return" and specifically prohibit amendment, that an amended return may not be accepted to correct an error unless filed on or about the due date or before the passage of an extended due date. *Haggar Company* v. *Helvering,* 308 U. S. 389; *Scaife Company* v. *Commissioner,* 314 U. S. 459; *Lerner Stores Corp.* v. *Commissioner,* 314 U. S. 463.

Also the decisions of this Court consistently hold that where the statute requires an election shall be made in a first return as in the case of percentage depletion,[4] the election may not be made in an amended return filed after the due date or an extended due date. *J. E. Riley Investment Co.* v. *Commissioner,* 311 U. S. 55; *Mother Lode Company,* 317 U. S. 222; *Degnan* v. *Commissioner,* C. C. A. 9; 136 F. (2d) 891; 64 Supreme Court 93, cert. den.

On the other hand, in the *J. E. Riley Investment Company* decision *supra,* this Court was careful to point out that it was "not dealing with an amendment designed merely to correct errors and miscalculations in the original return", thus recognizing that there were circumstances under which an amended return was permissible even after the expiration of the due date.

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[2] *Estate of Daniel Bleser, et al.* v. *Commissioner,* 41 B. T. A. 643; *Zaida Clay,* 40 B. T. A. 561.

[3] Section 215 National Industrial Recovery Act of 1933; 48 Stat. 195, 207; Section 105 Revenue Act of 1935; 49 Stat. 1014, 1017.

[4] Section 114(b)(4) of the Revenue Act of 1934; 48 Stat. 680 * * * "A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election made."

It is respectfully submitted that this case properly falls within the class of cases where an amended return to correct an error due to innocent oversight is permissible even after the expiration of the due date for filing returns. The statute, Section 351(d), does not prohibit amendments and does not even require that the shares of the corporate net income be included in a "first return". It specifies merely "at the time of filing their returns". Furthermore, the statute does not require an election such as to deduct depletion on the basis of percentage or cost, to file a joint or separate return or to report income from sales on the deferred or installment basis. It merely provides that where the purpose of Congress[5] to subject personal holding company income to individual surtaxes is accomplished by the stockholders voluntarily including their shares of the corporate net income in their returns, the corporation shall not be subject to the penalty surtax.

The conditions of the statute were complied with by the taxpayer corporation and all but one small stockholder who voluntarily and in accordance with his previous agreement corrected his omission of his share of income after a delay of only thirteen days. An extension for so short a period of the time for filing the amended return could have been granted under Section 53 of the Revenue Act of 1934. In this case the acceptance of an amended return, filed within a short time after the due date and within the time within which an extension might have been obtained, violates no statutory prohibition nor administrative policy, and carries out the agreement of the stockholders and the purpose of Congress.

For the foregoing reasons it is respectfully submitted that this petition should be granted.

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FRANCIS L. CASEY
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Counsel for Petitioner.

January 27, 1944.

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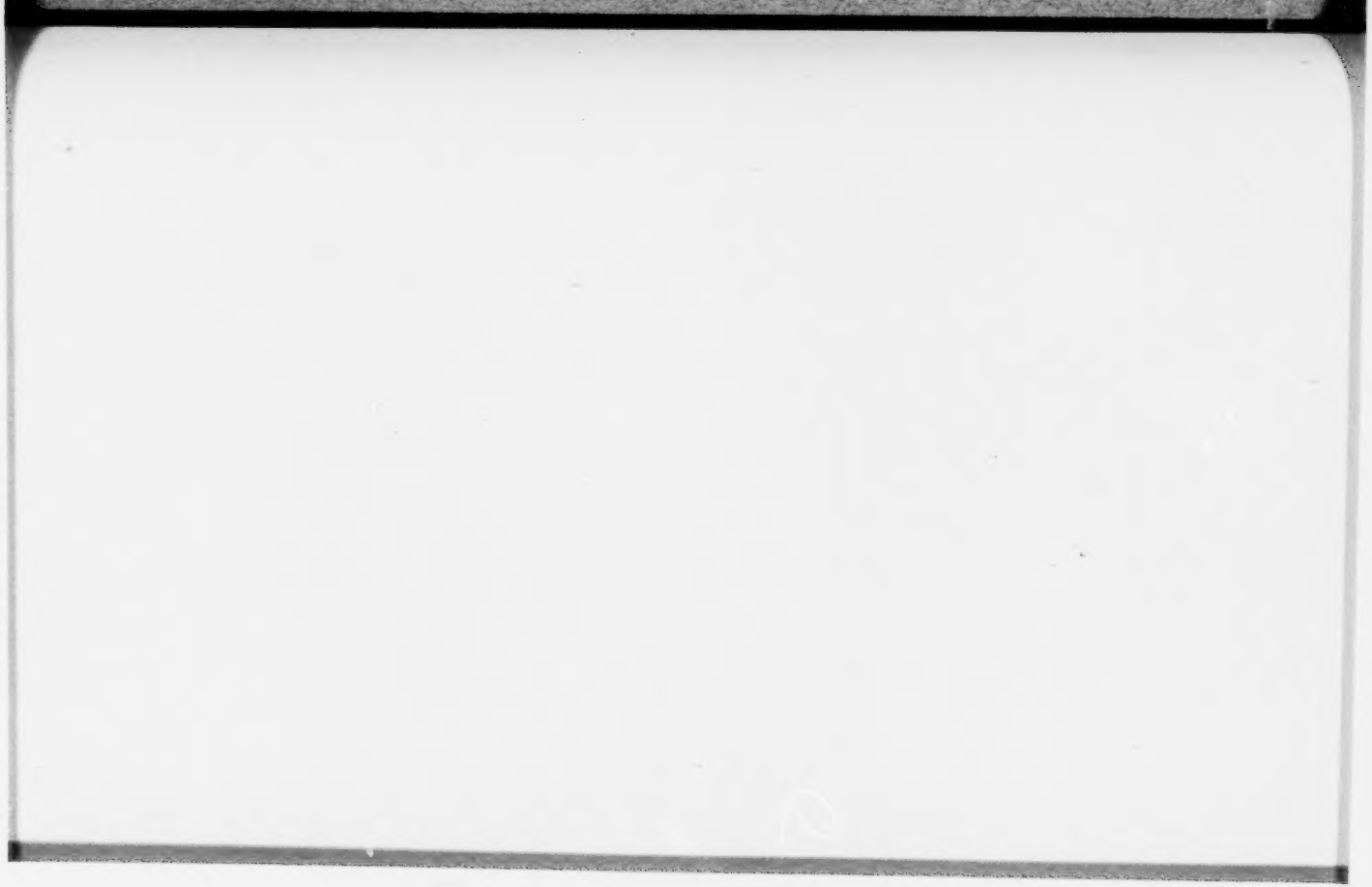
[5] Congressional Record, Volume 78, Pages 6240, 6308 and 6326.



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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court of the United States (R. 14–22) are reported in 1 T. C. 808. The opinion and dissenting opinion of the Circuit Court of Appeals (R. 33–37) are reported in 138 F. 2d 455.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 1, 1943. (R. 37.) The petition for a writ of certiorari was filed on January 28, 1944. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Is a personal holding company subject to the surtax imposed by Section 351 (a) of the Revenue Act of 1934 for the year 1935, or is it entitled to exemption under Section 351 (d), where one of the stockholders failed to include his pro rata share of the "adjusted net income" of the company in a timely income tax return filed on or before March 15, 1936, but included the amount in a second amended return filed out of time on March 28, 1936?

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and regulations involved are set out in the Appendix, *infra,* pp. 10–12.

STATEMENT

The facts as found by the Tax Court (R. 16–18) may be summarized as follows:

The taxpayer is a corporation duly organized and existing under the laws of Delaware with an office in the Brown-Marx Building, Birmingham, Alabama. (R. 16.)[1] During the year 1935 the taxpayer was a personal holding company with 80

[1] The name of the taxpayer was changed on July 3, 1940, from Southern Investors Corporation to its present name, Birmingham Corporation. (R. 3, 16.)

shares of class A stock and 720 shares of class B stock owned as follows (R. 16):

	A	B
Otto Marx, Sr	79 9/10	454
Agnes M. Marx	2/10	5
Trust for the benefit of Audrey A. Dietsch		63
Otto Marx, Jr		99
Henry M. Marx		99
Total	80	720

Agnes Mosler Marx was the wife of Otto Marx, Sr., and Audrey A. Dietsch, Henry M. Marx, and Otto Marx, Jr., were their children. (R. 16.)

Otto Marx, Sr., dominated the corporation. During 1935 the only formal directors' and stockholders' meetings held occurred on January 8. Otherwise the affairs of the corporation were conducted in an informal manner. (R. 16.)

In December, 1935, Otto Marx, Sr., determined it would be to the company's advantage not to distribute its earnings for 1935, and in oral conversations he proposed to the other stockholders that such a course be followed and that each stockholder in his individual income tax return for 1935 include his pro rata share of the company's adjusted net income. All the stockholders agreed. (R. 17.)

The company on March 16, 1936, filed a personal holding company tax return on Form 1120 H and reported adjusted net income of $43,997.35 stating that it would avail itself of Section 351 (d) of the Revenue Act of 1934 (Appendix,

infra). In schedule D of the return the following amounts were reported to be included in the individual tax returns (R. 17):

Otto Marx, Sr	$29,357.24
Agnes M. Marx	285.98
Trustees for Audrey A. Dietsch	3,464.80
Otto Marx, Jr	5,444.67
Henry M. Marx	5,444.67
Total	$43,997.36

All of the stockholders, except Henry M. Marx, included the above amounts in their individual income tax returns for the year 1935. (R. 17–18.)

Henry M. Marx filed a return on or about February 20, 1936, which did not include his pro rata share of the company's adjusted net income for the calendar year 1935. On March 7, 1936, he filed an amended return and did not include therein his pro rata share of the adjusted net income of the taxpayer for the year 1935. (R. 18.)

On or about March 8 or 9, 1936, the company's secretary, Wilkens, informed Henry M. Marx of his pro rata share. At this time he was busy in professional work as a lawyer and neglected to take immediate steps to correct his mistake of failing to include in his first return filed February 20, 1936, and his amended return filed March 7, 1936, his share of the adjusted net income of the company. On March 28, 1936, he filed an amended return including his pro rata share. (R. 18.)

The Tax Court held that the second amended return of Henry M. Marx, filed March 28, 1936, was too late and did not comply with the require-

ments of Section 351 (d) of the Revenue Act of 1934. It sustained the imposition of the personal holding company surtax. (R. 15, 23.)

The Circuit Court of Appeals, one judge dissenting, affirmed the decision of the Tax Court. (R. 33–37.)

ARGUMENT

The taxpayer, admittedly a personal holding company, is subject to the surtax imposed by Section 351 (a) of the Revenue Act of 1934 (Appendix, *infra*) unless the requirements of Section 351 (d) of that Act (Appendix, *infra*) have been complied with.

Section 351 (d) provides that the surtax shall not apply "if *all* the shareholders of the corporation include (*at the time of filing their returns*) in their gross income their *entire* pro rata shares, whether distributed or not, of the 'adjusted net income' of the corporation for such year." (Italics supplied.)

Thus to avoid the surtax, the statute requires that "all" of the shareholders, not some, must include their pro rata share of the net income of the company "at the time of filing their returns." Admittedly neither of those requirements was complied with in the instant case. One of the stockholders, Henry Marx, filed his individual tax return for the year 1935 on February 20, 1936, and an amended return on March 7, 1936. Neither of those returns included his pro rata share of the company's net income. In the ab-

sence of securing an extension of time to file, March 15, 1936, is the last day fixed by law for filing a timely return. He secured no extension but on March 28, 1936, he filed a delinquent amended return in which his pro rata share was included. An extension of time for filing returns is not a matter of right but is granted only in cases where good cause is shown. Furthermore, the taxpayer had filed an original and an amended return so that no extension to file was in order. Nor was an extension requested or granted.

The language of the statute is clear and free from ambiguity. It prescribes the condition precedent for escaping the surtax that the stockholders include their share of the net income of the company at the time of filing their individual returns, on or before March 15. That condition was not complied with and the surtax was therefore properly imposed.

The decision below is in accord with principles established by this court in *Riley Co.* v. *Commissioner,* 311 U. S. 55; *Scaife Co.* v. *Commissioner,* 314 U. S. 459; and *Helvering* v. *Lerner Stores Co.,* 314 U. S. 463. Cf. *Mother Lode Co.* v. *Commissioner,* 317 U. S. 222. Nor do the decisions in the lower courts promote "confusion and conflict" as suggested by the taxpayer (Pet. p. 5).[2] Section

[2] Of the two cases cited by petitioner in support of this statement, *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. (2d) 388 (C. C. A. 4), is definitely inconsistent with *Riley Co.* v. *Commissioner,* 311 U. S. 55; indeed this Court expressly noted that its grant of certiorari in the *Riley* case was predicated

351 gives a personal holding company and its stockholders an election as to whether the corporation should pay the surtax or the shareholders pay individual income taxes on the undistributed corporate net income. The decision below is in accord with many cases holding that a statutory choice under the revenue acts cannot be changed after the date for the timely filing of returns has passed.[3] Indeed in *Pacific National Co.* v. *Welch*, 304 U. S. 191, 194, a case involving an election between two methods of reporting gain or loss on installment sales, the Court said (pp. 194–195):

> There is nothing to suggest that Congress intended to permit a taxpayer, after expi-

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on the conflict between the decision below in that case (which was affirmed) and the *Mead* case. *Morrow, Becker & Ewing* v. *Commissioner*, 57 F. (2d) 1 (C. C. A. 5), permitted the taxpayer to amend out of time because the original return was filed before the adoption of regulations under a new law which made radical changes in the existing law. No such circumstance occurs here.

[3] Election of husband and wife to file joint or separate returns: *Rose* v. *Grant*, 39 F. (2d) 340 (C. C. A. 5); *Buttolph* v. *Commissioner*, 29 F. (2d) 695, 696 (C. C. A. 7); *United States* v. *Pettigrew*, 81 F. (2d) 666 (C. C. A. 9th); and *Champlin* v. *Commissioner*, 78 F. (2d) 905 (C. C. A. 10th). Election of affiliated corporations to file consolidated or separate returns: *Dr. Pepper Bottling Co.* v. *Commissioner*, 69 F. (2d) 768 (C. C. A. 5); *Radiant Glass Co.* v. *Burnet*, 54 F. (2d) 718 (App. D. C.); *Alameda Inv. Co.* v. *McLaughlin*, 33 F. (2d) 120 (C. C. A. 9th). Election as to method of returning profits on installment sales: *Pacific National Co.* v. *Welch*, 304 U. S. 191, 194; *Commissioner* v. *Moore*, 48 F. (2d) 526 (C. C. A. 10th), certiorari denied, 284 U. S. 620.

ration of the time within which return is to be made, to have his tax liability computed and settled according to the other method. By reporting income from the sales in question according to the deferred payment method, petitioner made an election that is binding upon it and the commissioner.

The Board of Tax Appeals, now the Tax Court, has consistently held that the statutory requirements of Section 351 (d) must be strictly followed in returns filed by the stockholders on or before March 15, the due date prescribed by law for filing returns. *Automobile Loans, Inc.* v. *Commissioner,* 36 B. T. A. 809; *Collateral Mortgage & Investment Co.* v. *Commissioner,* 37 B. T. A. 630. Cf. *Howe* v. *Commissioner,* 44 B. T. A. 894.[4]

The dissenting opinion below is based on hardship, lack of fraud or intent to evade taxes, and the acceptance of the amended return by the Collector. But the plain and obvious requirements of the statute cannot be sacrificed even for the

[4] The taxpayer relies (Pet. 6) upon the cases of *Clay* v. *Commissioner,* 40 B. T. A. 562, and *Bleser* v. *Commissioner,* 41 B. T. A. 643. Neither of those cases is in point or applicable to the facts of the instant case. In the *Clay* case the Board held that a "slight discrepancy" between the income reported by the sole stockholder of a company and its true adjusted net income was immaterial. But there a timely return had been filed which was believed to show the correct amount of the company's net income. In the *Bleser* case the Board held that the executors were taxable on decedent's entire distributive share of the corporation's net income even though considerably in excess of the amount reported by the decedent.

exigency of a hard case. *Riley Co.* v. *Commissioner, supra,* pp. 58–59; *Scaife Co.* v. *Commissioner, supra,* p. 463; *Deputy* v. *du Pont,* 308 U. S. 488, 498. In the *Riley* case the equities of the taxpayer were far stronger than in the case at bar. There the taxpayer's remoteness and lack of adequate mail service were responsible for his failure to know of a change in the statute. Here the stockholder, a lawyer who was fully aware of the statutory requirements, was merely too busy to file the proper return on time.

CONCLUSION

The decision below is correct, there is no conflict, and the petition should be denied.

Respectfully submitted.

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FEBRUARY 1944.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for Filing.*—

(1) *General Rule.*—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

(2) *Extension of Time.*—The Commissioner may grant a reasonable extension of time for filing returns, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

* * * * *

SEC. 351. SURTAX ON PERSONAL HOLDING COMPANIES.

(a) *Imposition of Tax.*—There shall be levied, collected, and paid, for each taxable year, upon the undistributed adjusted net income of every personal holding company a surtax equal to the sum of the following:

(1) 30 per centum of the amount thereof not in excess of $100,000; plus

(2) 40 per centum of the amount thereof in excess of $100,000.

* * * * *

(c) *Administrative Provisions.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of this Act, shall insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, except that the provisions of section 131 of that title shall not be applicable.

(d) *Payment of Surtax on Pro Rata Shares.*—The tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire pro rata shares, whether distributed or not, of the "adjusted net income" of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. Any subsequent distribution made by the corporation out of earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his pro rata share, be exempt from tax in the amount of the share so included.

* * * * *

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 53–1. *Time for filing returns.*—Returns of income * * * must be made on or before the 15th day of the third month following the close of the taxable year. * * *

ART. 53–4. *Due date of return.*—The due date is the date on or before which a return is required to be filed in accordance with the provisions of the Act or the last day of the period covered by an extension of time granted by the Commissioner or a collector. When the due date falls on

Sunday or a legal holiday, the due date for filing returns will be the day following such Sunday or legal holiday. If placed in the mails, the returns should be posted in ample time to reach the collector's office, under ordinary handling of the mails, on or before the date on which the return is required to be filed. If a return is made and placed in the mails in due course, properly addressed and postage paid, in ample time to reach the office of the collector on or before the due date, no penalty will attach should the return not actually be received by such officer until subsequent to that date. * * *

ART. 351–7. *Payment of surtax on pro rata shares.*—The surtax imposed by section 351 does not apply to any taxable year if *every* shareholder includes, at the time of filing his return, in his gross income his *entire* pro rata share of the adjusted net income of the corporation for the taxable year of such corporation ending with or during his taxable year.

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ART. 351–8. *Return and payment of tax.*—A separate return is required for the surtax imposed under section 351. Such return shall be made on Form 1120H. In the case of a personal holding company which is a domestic corporation, the return is required to be made within the time prescribed in section 53 and in the case of a foreign corporation within the time prescribed in section 235. * * * The administrative provisions applicable to the surtax imposed by section 351 are not confined to those contained in Title I but embrace all administrative provisions of law which have any application to income taxes.

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